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Agricultural Exports: Technical Barriers to Trade

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Summary

Technical barriers to trade (TBTs) are widely divergent measures that countries use to regulate markets, protect their consumers, and preserve natural resources, but which can also discriminate against imports in favor of domestic products. Most TBTs in agriculture are sanitary and phytosanitary (SPS) measures designed to protect humans, animals, and plants from contaminants, diseases, and pests. Since implementation of trade agreements aimed at reducing tariffs, import quotas, and other trade barriers, TBTs have become more prominent concerns for agricultural exporters and policymakers.

What Are Technical Barriers?

Key trade agreements—notably the 1993 North American Free Trade Agreement (NAFTA) with Canada and Mexico, and the 1994 World Trade Organization-Uruguay Round (WTO-UR) multilateral agreements—include commitments by member countries to eliminate or reduce their barriers to trade in agricultural and other goods. Trade barriers include tariffs (taxes on imported products), as well as many nontariff measures that can restrict trade, including import quotas, restrictive licensing systems, export and domestic production subsidies. Prior to the NAFTA and WTO-UR agreements, these types of tariff and nontariff barriers (NTBs) were at the center of major disputes between countries regarding access to each other's markets.

The agreements subject these barriers to rules and disciplines aimed at reducing their trade-distorting impacts. Also, the agreements attempt to establish stronger disciplines for yet another type of NTB that countries now use frequently: so-called technical barriers to trade (TBTs). These are various measures that countries use to regulate markets, and to protect their consumers and natural resources (among other goals), but which can also discriminate against imports to protect domestic industries, including agriculture.

TBTs with the greatest impact on agriculture are the various sanitary and phytosanitary (SPS) measures designed to protect humans, animals, and plants from diseases, pests, and other contaminants. Examples are residue limits for pesticides in foods, processing standards for meat products to reduce pathogens, and fumigation

requirements on grain or produce imports to kill unwanted pests. Besides SPS measures, TBTs include rules for product weight, size, or packaging; ingredient or identity standards; mandatory nutrition labeling; and shelf-life restrictions.

The broad term “technical *barriers* to trade” is frequently applied to all of these measures, even where they may be consistent with NAFTA and WTO rules (i.e., legitimate efforts by a country to protect its consumers and agricultural resources). “Still, it is widely recognized that there is enormous potential for, and perhaps widespread misuse of, technical measures as nontransparent [disguised or unclear] obstacles to trade, even when the broad desirability of lowering risks to health and safety is acknowledged, and despite ... international rules.”¹

Impacts on U.S. Agricultural Exports and Trade Policy

Simply identifying and keeping track of the many technical measures countries are using has become a major challenge for trade officials. Negotiating the removal of those designed primarily to protect a country’s domestic products from foreign competition can be even more difficult—but it is a high priority for U.S. agricultural interests. Following are examples of technical barriers that U.S. interests believe are unjustified—but that the implementing countries contend are both consistent with international trade obligations and necessary to protect their consumers and/or agricultural resources:

- A European Union (EU) ban, in place since 1989, on imports of meat products from animals treated with growth-promoting hormones, which has effectively blocked most U.S. meat (mainly beef) exports there. Although the WTO in 1999 agreed with U.S. (and Canadian) arguments that the ban lacks scientific justification and must be removed, the EU has maintained it;
- Lengthy approval procedures in the EU for genetically modified organisms (GMOs) and mandatory labeling of products containing GMOs that the United States considers cumbersome and not scientifically justified—effectively hampering U.S. exports there of such crops as corn and soybeans;
- Korean border procedures that can delay imported food and agricultural products for 2 weeks to 2 months, compared with several days elsewhere in Asia. Among numerous procedural problems is Korea’s required incubation testing of Florida fruit even if accompanied by a USDA certificate that it is from a pest-free area;
- Australian phytosanitary regulations restricting imports of U.S. fruits including Florida citrus, grapes, blueberries, stone fruit, apples, and pears.

¹ Orden, David, and Donna Roberts. Foreword to *Understanding Technical Barriers to Agricultural Trade*, proceedings of a conference of the International Agricultural Trade Research Consortium, January 1997. Other sources of information include the following USDA/ERS publications: Roberts and Kate DeRemer, *Overview of Technical Barriers to U.S. Agricultural Exports* (Staff Paper AGES-9705), March 1997; Roberts, Timothy E. Josling, and David Orden, *A Framework for Analyzing Technical Trade Barriers in Agricultural Markets* (Technical Bulletin 1876), March 1999, and *Agriculture in the WTO* (WRS-98-4), December 1998.

USDA's Economic Research Service (ERS) and Foreign Agricultural Service (FAS) attempted to inventory, summarize, and quantify the overall cost impacts of foreign TBTs on U.S. agricultural exports for 1996, using information gathered from, among other sources, USDA's foreign agricultural attaches and industry groups.² Working from that database, FAS found in 1997 more than 350 measures negatively affecting an estimated \$5.8 billion in potential U.S. agricultural exports. East Asia had the most technical barriers, with an estimated impact on U.S. exports of nearly \$2.9 billion. The Americas accounted for nearly \$1.3 billion, and Europe for more than \$900 million. Processed products accounted for about \$1.3 billion of the \$5.8 billion total. Others were grains and oilseeds, about \$1.3 billion; animal products, nearly \$900 million; fruits and vegetables, over \$600 million; and "other products" including cotton, seeds, nuts, fish and forestry products, about \$1 billion in all.

Other nations argue that the United States maintains its own SPS measures and other TBTs, many of which they view as unjustifiable. Examples include a prohibition against shrimp imports from Southeast Asian countries because their trawlers do not use the type of nets used by U.S. shrimpers to protect sea turtles (the WTO has since ruled the ban was applied in a discriminatory manner); and U.S. import restrictions against more than 100 products because foreign pest risk analyses have not been completed. Because free trade is a two-way street, and if the U.S. challenges are to have credibility, U.S. interests must be prepared to acknowledge these barriers and to negotiate their removal, it is argued.

Provisions of Key Trade Agreements

Negotiators had anticipated that the inclusion of stronger agricultural disciplines in the WTO and NAFTA agreements might provide more incentive for countries to replace expiring NTBs with new technical barriers in order to continue to protect their domestic producers. To address this potential problem, the WTO and NAFTA agreements include extensive language governing the circumstances under which countries may impose both TBTs in general, and SPS measures in particular. This language is intended to commit each country to imposing only SPS and other technical measures that are legitimate (e.g., to protect human, animal or plant health), not merely disguised barriers to trade.

SPS Provisions

In NAFTA, SPS measures are in the chapter on agriculture. The UR-WTO is written as a series of agreements, including separate ones on agriculture and on SPS—the Agreement on the Application of Sanitary and Phytosanitary Measures. Despite these differences in format, the SPS provisions in both the UR accords and NAFTA are similar.

² *Overview of Technical Barriers to U.S. Agricultural Exports*. This report has not been updated by USDA. Another source is the Office of the U.S. Trade Representative, which is required to file an annual report on foreign trade barriers faced by all U.S. exporters, including agriculture. The report categorizes, describes, and in some cases, quantifies, these barriers on a country-by-country basis. The 1999 *National Trade Estimates Report on Foreign Trade Barriers* can be accessed on the Internet at [<http://www.ustr.gov/reports/nte/1999/contents.html>].

Basic Rights and Obligations. Each country may decide its own “appropriate level of protection” of human, animal, or plant life or health. Such measures—which can be more stringent than other countries’ and differ from international benchmarks—are acceptable as long as they are based on scientific principles and risk assessment, applied consistently to all countries, and not used as disguised trade barriers.

Harmonization and Equivalence. To facilitate trade, countries are encouraged to use relevant international standards and work toward harmonization—that is, the adoption of common SPS measures. To promote harmonization, the agreements cite, as sources of scientific expertise and globally recognized standards, international bodies such as the Codex Alimentarius Commission, which deals with food safety issues; the International Office of Epizootics (IOE), for animal health and diseases; and the International Plant Protection Convention (IPPC), for plant health. Equivalence means that each importing country must accept the SPS measures of another country as equivalent to its own (even if they are not exactly the same), as long as the exporting country objectively demonstrates to the importing country that its measures achieve the same level of protection.

Transparency. In recognition that SPS regulations can be unclear or even capricious, countries must have a mechanism for notifying others in advance about measures that could affect trade, and providing a means to ask questions about, and comment on, them.

Regionalization. Countries have banned imports of a product if it has been associated with an unwanted pest or disease in the exporting country. Until recently, these countries would not permit any of that product from the exporting country, even if it came from a region without the disease or pest. Regionalization provides for acceptance of such imports if the exporting country can prove that they are from a disease-free or pest-free area.

TBT Provisions

The WTO’s Agreement on Technical Barriers to Trade “protects the right of Members to adopt measures which ensure the quality of exports; protect human, animal, or plant life; protect the environment; or prevent deceptive practices, as long as these measures do not breach the disciplines set forth in the Agreement. Many of the disciplines in the TBT Agreement are essentially identical to those in the SPS agreement [including the obligation to notify and allow for comments on proposed standards affecting trade], but the TBT Agreement explicitly states that SPS measures are bound only by the terms of the SPS agreement.”³ NAFTA’s TBT provisions, which are part of the chapter on Standards-Related Measures, take a generally similar approach.

Dispute Settlement

The UR accords also include a n “Understanding on Rules and Procedures Governing the Settlement of Disputes” to provide a mechanism for resolving, in a timely and objective manner, trade disputes between countries, including those involving SPS measures and other TBTs. Under pre-UR dispute settlement procedures, a country involved in the dispute effectively could block a decision against it, which cannot occur under the newer system. If a WTO dispute settlement panel ultimately determines that a country’s SPS or TBT

³ *Overview of Foreign Technical Barriers to U.S. Agricultural Exports.*

measure is inconsistent with WTO obligations, and WTO members adopt the panel report, the “guilty” country (which can appeal the decision on matters of law and legal interpretation) could still maintain the measure, but only if it also provides compensation to the complaining country. If compensation is not provided and the two countries still fail to reach a mutually acceptable solution, the WTO panel can authorize trade retaliation against the country. NAFTA also contains a dispute resolution mechanism that can be used to challenge SPS measures and other TBTs. Both the WTO and NAFTA procedures allow for scientific advice to the panels.

U.S. Procedures for Identifying and Addressing TBTs

With SPS and TBT disciplines now in place, the U.S. process for identifying and dealing with them is an important consideration. For agriculture, most of this effort is coordinated, at least in the initial stages, by the Food Safety and Technical Service Division (FSTSD) of FAS, the lead USDA trade agency. The division maintains a database on foreign TBT measures with a potential impact on trade, which are listed even though they may comply with WTO or other international trade agreement provisions.

FSTSD continually collects information on these measures from the WTO, which countries are obligated to notify whenever they propose a new TBT measure; industry groups attempting to export products; the U.S. Trade Representative (USTR); FAS’s overseas posts; and various regulatory agencies such as USDA’s Animal and Plant Health Inspection Service (APHIS) and Food Safety and Inspection Service (FSIS), the Environmental Protection Agency (EPA), and the HHS Department’s Food and Drug Administration (FDA). In 1996, for example, 52 new TBT issues were identified.

FAS chairs a weekly meeting of USDA technical staff of various USDA agencies to discuss the status of emerging and ongoing TBT issues, including options for resolving a potential dispute. Monthly meetings are co-chaired by FAS and APHIS to discuss general SPS issues which are attended by State Department, USTR, FDA, and EPA representatives. USTR also chairs an interagency group that meets regularly on WTO SPS issues. Meanwhile, technical and other government officials are likely to have initiated at least informal dialogue with countries concerning the measure in question, and they also are communicating with affected industries in the private sector, both to keep them informed and to gather additional information. Eventually, bilateral consultations with the foreign country over an outstanding SPS or TBT issue might be pursued by USTR, with USDA’s assistance. USTR also can decide at any point to elevate the issue via a formal complaint with the WTO or NAFTA, triggering formal dispute resolution procedures.⁴

Critics had maintained that the U.S. structure for coordinating, prioritizing, and deciding on how to address these issues was ambiguous and unclear. In response, USDA

⁴ Sections 301 *et seq.* of the Trade Act of 1974 delineate the domestic legal authority and procedures for U.S. officials in investigating and challenging unfair trade practices, and enforcing U.S. rights under international trade agreements. Interested parties, including agricultural groups, can—and do—petition USTR to initiate such procedures under Section 301 if they believe that a challenge is warranted and that the Administration is not addressing the issue. For an explanation of Section 301, see House Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes* (WMCP 105-4), June 25, 1997.

created a formal TBT policy group headed by the Secretary's special trade advisor and composed of senior officials of relevant agencies, who meet at least monthly.

Related Issues

Despite the steps so far to address problems related to TBTs, numerous issues remain. For example, food safety and environmental advocates have long expressed concerns that the ongoing efforts to harmonize international standards (such as under Codex, IOE, and IPPC) might encourage the United States to weaken its own food safety and environmental protections. Relatedly, U.S. health and safety standards could be undermined if WTO dispute settlement panels question their scientific basis and/or attempt to compare them to weaker international standards, some advocates argue.

Others counter that the current trade agreements explicitly recognize the right of individual nations (as well as states and localities) to enact stronger protections if they believe they are appropriate. If a WTO or NAFTA dispute panel is convened to determine whether an SPS measure has a scientific basis, it is only tasked with determining whether the SPS measure at issue is based on scientific principles (and is being applied consistently)—not whether the measure necessarily uses the “best science.”

Another issue is the effectiveness of the WTO dispute settlement mechanisms to resolve trade issues including those relating to technical barriers. On the one hand, critics point to examples such as the continued failure to open the EU to U.S. beef exports despite WTO rulings in favor of the U.S. position. On the other hand, a March 1999 report by a WTO committee concluded that, despite a few such high-profile disputes, the SPS agreement has helped to defuse potential disputes before they occur, bring transparency to countries' application of SPS and related measures, and improve trading relations.⁵

One challenge for U.S. and foreign negotiators is the recent proliferation of agricultural products containing GMOs. Biotechnology was not at issue when the TBT and SPS agreements were finalized in 1994, and one question is whether the agreements contain an effective framework for resolving disputes in this area. While some argue that future WTO negotiations should re-examine these agreements to clarify how biotechnology concerns should be addressed, others believe they are adequate—and that some countries might attempt to use such an examination to introduce new considerations (i.e. consumer preferences, etc.) that could undermine their scientific basis.⁶

Because the SPS and TBT provisions, and dispute settlement procedures, are relatively new, analysts are still seeking the most appropriate methods for measuring their economic and other impacts; even their definition and relative importance are still being debated.⁷

⁵ The report can be viewed on the Internet at [<http://www.econ.ag.gov/epubs/pdf/tb1876/>].

⁶ See: “Biotechnology in Agriculture Confronts Agreements in the WTO,” *Agriculture in the WTO*.

⁷ ERS's *A Framework for Analyzing Technical Trade Barriers in Agricultural Markets* can be viewed on the Internet at [<http://www.econ.ag.gov/epubs/pdf/tb1876/>].